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GASOHOL COMPETITION ACT OF 1980

NOVEMBER 13, 1980—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. HUGHES, from the Committee on the Judiciary, submitted the following

REPORT

together with

SEPARATE VIEWS

[To accompany H.R. 7873]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 7873) to amend the Clayton Act to prohibit restrictions on the use of credit instruments in the purchase of gasohol, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Gasohol Competition Act of 1980".

SEC. 2. The Clayton Act is amended by renumbering the present "SEC. 26" as "SEC. 27", and inserting the following new section as section 26:

"SEC. 26. It shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that—

"(i) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where there is no similar limitation on transactions concerning such person's conventional motor fuel: *Provided*, That nothing in this section or in any other provision of law in effect on the date of enactment of this Act and which is specifically applicable to the sale of petroleum products, shall preclude such person from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or the other synthetic motor fuel if such fee equals no more than the actual costs to such person of extending that credit; or

"(ii) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where such synthetic or conventional motor fuel is

sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States: *Provided*, That the prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on equivalent terms and conditions as are available on such person's conventional motor fuel products: *Provided further*, That nothing in this section shall—

"(a) preclude such persons from requiring reasonable labeling of pumps dispensing the gasohol or the other synthetic motor fuel to indicate, where appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person; or

"(b) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or the other synthetic motor fuel; or

"(c) require such person to provide advertising support for the gasohol or the other synthetic motor fuel; or

"(d) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.".

I. Purpose of H.R. 7873

The purpose of H.R. 7873 is to make absolutely certain that retailers and distributors of synthetic fuels, including gasohol, will not be discriminated against by their suppliers and/or owners of their retail stations because of sales of synthetic fuels. This legislation eliminates what appears to be a significant impediment to the marketing of gasohol and other synthetic fuels as they are developed.

The bill adds a new section (section 26) to the Clayton Act. H.R. 7873 will promote the sale of gasohol and other synthetic motor fuels by ensuring that franchisees of existing major oil companies can utilize the company's credit arrangements and marketing facilities to promote these alternative sources of energy and to preclude unreasonable discrimination against dealers desiring to market these synthetic fuels.

It appears that in the past several major oil companies, which did not themselves produce or market gasohol, refused to permit their franchisees to utilize company pumps and tanks for the sale of gasohol. The companies refused to allow use of their credit system for gasohol sales. Moreover, some companies threatened to terminate a franchisee's contract if the franchisee even offered to sell gasohol.

H.R. 7873 makes in an antitrust violation for an oil company directly or indirectly to "impose any condition, restriction, agreement, or understanding" that limits the use of credit in, or otherwise unreasonably discriminates against, or limits the sale of synthetic fuel.

The bill is not designed to force any individual or company into marketing, selling or purchasing gasohol or other synthetic fuel, nor is it designed to place burdensome requirements on those companies that choose not to market gasohol themselves. H.R. 7873, is simply intended to remove any potential obstacles that may be raised by conventional fuel producers or suppliers to franchisees who desire to market synthetic fuels.

II. Summary of Reported Bill

Section 1 contains the short title of the bill, the "Gasohol Competition Act of 1980."

Section 2 amends the Clayton Act by redesignating the existing section 26 as 27 and inserting a new section 26.

Paragraph (i) of the bill provides that no "condition, restriction, agreement or understanding" may be imposed to limit "the use of credit instruments" in the sale of synthetic fuel where there is no similar limitation on the sale of "conventional motor fuel." However, the legislation does not prohibit a distributor or retailer of synthetic fuel from being charged a reasonable fee for the extension of credit on the sale of such fuel provided that the fee does not exceed the actual cost of extending such credit.

Paragraph (ii) of H.R. 7873 prohibits any other form of conduct that unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of synthetic fuel within the jurisdiction of the United States.

Paragraph (ii) also sets forth five exceptions to the above prohibitions. The first excepts a conventional motor fuel producer or supplier when it offers to supply adequate quantities of synthetic fuel to its franchisees.

The second exception provides that the producer or supplier is not precluded from requiring a retailer or distributor to label his gasoline pumps to indicate that the synthetic fuel is not manufactured, distributed or sold by such producer or supplier.

Third, the producer or supplier is not prohibited from issuing disclaimers of product liability for damage resulting from the use of synthetic fuel.

Fourth, the producer or supplier need not supply advertising for synthetic fuel sold by its retailer or distributor.

Fifth, the producer or supplier is not required to provide, at his own expense, any additional facilities, including pumps or storage tanks, for the sale of synthetic fuel.

III. Background

H.R. 7873 enjoys strong bipartisan support. The bill was unanimously reported by the Subcommittee on Monopolies and Commercial Law to the full Judiciary Committee. The Committee on the Judiciary by a record vote of 22–1 then favorably reported the legislation to the House.

In recent months, there has been increasing recognition of the need for rapid and effective development of alternative energy sources to offset this nation's dependence on the ever-dwindling supply of foreign and domestic oil. One program that will help to decrease America's reliance on foreign energy sources is the production and use of gasohol. Should the consuming public be denied the opportunity to purchase such alternative fuels, public and private efforts to encourage alternative fuel development will be frustrated.

Gasohol is a blended fuel produced by combining one part alcohol and nine parts of unleaded gasoline. Since the alcohol used is of the ethanol type, it may be produced from grain based raw materials.

The increased demand for ethanol would result in expanded markets for American grain and grain products.

Gasohol fuel allows motor vehicle operation in exactly the same manner as conventional motor fuel. American automobile manufacturers have indicated that gasohol use will not adversely affect the operation of their vehicles, and that new car warranties will continue to apply when gasohol is used.

The Subcommittee on Monopolies and Commercial Law did not hold hearings on H.R. 7873. However, similar legislation was the focus of hearings conducted by the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary. The record in those hearings documents threats to retailers and distributors of gasohol. This bill provides protection for those dealers at the same time protecting the rights of major petroleum producers.

Service station representatives' testimony revealed that the oil companies' actions were designed to impede the ability of service station owners and operators to sell gasohol in the following ways:

(1) Refusing to accept credit card charges for sales of gasohol;

(2) Alleging the retailer had breached his lease because of use of existing tanks and pumps for storage and sale of gasohol even though oil company markings or identifications were removed;

(3) Alleging a breach of a franchise contract based upon sales of fuel not branded or brandable as that of the franchisor; and

(4) Imposing stringent conditions upon the means by which gasohol is sold.

During the mark-up by the full Judiciary Committee, Congressman McClory raised the issue as to the preferred status of gasohol and other synthetic fuels as compared to conventional motor fuels. Congressman McClory and several other Members expressed concern that the legislation might make unlawful limitations on the use of credit instruments for, or restraints on the franchisee's sale of, a competing brand of synthetic fuel, even when an oil company offered in good faith to supply its own brand of gasohol or synthetic fuel. These Members were of the opinion that such an interpretation of the Act would be unfair to the producer or supplier. The Committee concluded that such an interpretation would run contrary to the overall intent of the legislation, which is simply to promote generally the sale of gasohol and other synthetic fuels and not to affect the sale of specific brands of those products.

Accordingly, the full Committee adopted an amendment that excepts any oil company from the prohibitions of the section when it "makes available sufficient supplies of gasohol and other synthetic motor fuels" to satisfy the franchisee's needs for such products, so long as such products are provided on the same terms as are available for such company's conventional motor fuel products.

The "equivalent terms and conditions" language requires the good faith of the producer or supplier in promoting the sale of gasohol and other synthetic fuels. It is assumed that a producer or supplier acts in good faith to promote its own conventional motor fuels. Such equivalence would be lacking, for example, where a producer or supplier purposely offered inadequate amounts of gasohol or other synthetic fuels, where a producer or supplier offered gasohol or other synthetic fuels at uncompetitive prices, or where a producer or supplier attached

terms and conditions more burdensome than those for its conventional fuels which terms and conditions could not be reasonably justified by product differences. And, of course, a producer or supplier must at all times offer its own brand of gasohol or synthetic fuels in conformity with applicable law, including in particular other provisions of the antitrust laws. This exception in no way legalizes any conduct illegal under the antitrust or any other laws today; rather it merely indicates the inapplicability of the new section 26 in certain circumstances.

The full Committee also addressed the issue of the type of conduct intended to be reached by this legislation. Congressman McClory raised the question of whether the bill's prohibition in paragraph (ii) applied to any discriminatory conduct or to unreasonably discriminatory conduct. Congressman Hughes, the sponsor of H.R. 7873, stated that the prohibitions apply only with respect to a person who "unreasonably discriminates against" the sale of synthetic motor fuels, such as gasohol. In light of this, the full Committee adopted an amendment clarifying the provisions.

H.R. 7873 embodies language that protects both the dealers and the oil companies. The legislation makes it a violation of the Clayton Act for anyone to discriminate against the sale of certain motor fuels. For example, an oil company is free to adopt any credit card policy for the sale of its own products, so long as that policy applied equally to the sale of conventional motor fuels and to the sale of gasohol or other synthetic fuels. Thus, the bill does not interfere with the oil companies' rights to set their own credit policy. The legislation would not prohibit policies based on proven differences between synthetic fuels and gasoline. For example, the requirement that a franchise indemnify an oil company for damages to the company's leased equipment, should the damage be proven directly attributable to the properties of gasohol, would not be unlawful under this bill.

IV. Provisions

Section 1 contains the short title of the bill, the "Gasohol Competition Act of 1980."

Section 2 amends the Clayton Act to add a new section, section 26, prohibiting those engaged in petroleum refining and marketing from unreasonably discriminating against or unreasonably limiting the sale of synthetic motor fuels, including gasohol.

Paragraph (i) specifically addresses the use of credit card practices that would inhibit the sale of gasohol and other equivalent synthetic motor fuels. Pursuant to this provision, a petroleum company may adopt any policy respecting the extension of credit for the sale of its own products, so long as the credit policy applies with equal force to the sale of synthetic motor fuels. H.R. 7873 does not interfere with an oil company's right to establish its own credit policies; rather it only prevents that company from utilizing such policies in a discriminatory manner to limit the sale of gasohol and other synthetic fuels.

Paragraph (i) further provides that an oil company is not precluded from charging its franchisee a reasonable fee for the extension of credit on the sale of synthetic motor fuels so long as such fee does not exceed the "actual costs" of extending such credit. The term "ac-

tual costs" clearly includes administrative and personnel expenses associated with the extension of credit. Moreover, it is the Committee's intent that the "actual costs" also include the company's interest or cost of money.

Since it is technologically and commercially impracticable to differentiate the costs associated with credit sales and to apportion them to the particular products, the costs used to calculate the credit fee may be based on the annual, average net cost of maintaining a company's credit system assessed equally to all credit invoices regardless of the product, conventional motor fuel or gasohol.

It should not be considered discriminatory under the Act for oil companies to insist on a reasonable system of identifying their retailers' credit card gasohol sales in order to assess the appropriate credit card fees.

The term "gasohol" refers to any motor fuels composed of 90 percent unleaded gasoline and 10 percent alcohol.

The term "synthetic motor fuel of equivalent usability" refers to any synthetic motor fuel that has reached the same level of quality and acceptability as gasohol. Synthetic motor fuels of "equivalent usability" would be those which are as efficient, as safe, and as nonharmful as gasohol.

Paragraph (ii) provides a more general prohibition against other conduct that would unreasonably discriminate against or limit the sale of gasohol and other synthetic motor fuels.

The term "unreasonably discriminates" is not intended to eliminate all differentiation between gasohol and gasoline but rather to include only that conduct which is unreasonably discriminatory in its impact with respect to the sale, resale, or transfer of synthetic fuels. Although both are motor fuels, they differ to a certain extent, i.e. gasohol is a motor fuel composed of 90 percent unleaded gasoline and 10 percent alcohol. Therefore, oil company policies or actions that differentiate between the two fuels based on actual, proven differences are not precluded by H.R. 7873. For example, a franchising oil company can require its franchisee to indemnify the oil company for any damages to its leased equipment should the damages be proven to be directly attributable to the properties of gasohol.

Paragraph (ii) also prohibits unreasonable limitations on the sale of gasohol and other synthetic fuels. The phrase "unreasonably limits" was used to cover obstacles to the marketing of gasohol that were not necessarily discriminatory. For example, if an oil company forbids the use of its pumps and tanks for dispensing any noncompany product, gasohol is not singled out, but its sale is nonetheless impeded. This limitation, although nondiscriminatory, should be prevented and will be reached under paragraph (ii) of this legislation.

Paragraph (ii) sets forth several exceptions to the Act's general prohibition on conduct that unreasonably discriminates against or limits the sale, resale or transfer of synthetic motor fuels.

The first proviso states that a producer or supplier of conventional motor fuel is exempt from the provisions of the bill if such producer or supplier can provide the franchisee with an ample supply of gasohol or other synthetic motor fuel. In addition, the producer or supplier must provide the synthetic fuel on the same terms and conditions as are available for the purchase of its conventional motor fuels, i.e., terms

and conditions designed to advance and promote the sale of gasohol and other synthetic motor fuels.

The second proviso sets forth four specific practices that are not considered to be unreasonable.

Subparagraph (ii)(a) allows the producer or supplier to require labeling of pumps dispensing synthetic motor fuels, including gasohol, indicating when appropriate that the fuel is not its product. The labeling requirement must be a reasonable one; compliance must not entail extraordinary expense by the franchisee desiring to market gasohol or any other synthetic fuel.

The labeling proviso is not meant to displace existing antitrust and trademark law governing anticompetitive restraints in the context of trademark licensing. It is not intended to preclude claims that such labeling requirements violate the Sherman, Clayton or FTC Acts.

Subparagraph (ii)(b) would permit the producer or supplier to issue appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel. Of course, disclaimers about unsubstantiated and undocumentable risks associated with the use of gasohol or other synthetic fuels, issued for the purpose of discouraging the consumption and marketing of gasohol, would not be permitted under this Act. The disclaimers must be "appropriate."

Subparagraph (ii)(c) establishes that the Act would not require the producers or suppliers to provide advertising support for gasohol or other synthetic fuels.

Subparagraph (ii)(d) establishes that the Act would not require the producers or suppliers to furnish at their own expense additional pumps, tanks or other related facilities required for the sale of the gasohol or other synthetic motor fuel. The Act does require, however, that they permit existing tanks, pumps and related facilities to be used for the sale of gasohol or other synthetic motor fuels, unless technical problems would prevent commingling the synthetic motor fuels with the company's conventional gasoline. Failure to permit existing tanks and pumps to be used for gasohol and other synthetic fuels, while not discriminatory, would be considered an unreasonable limitation on the sale of such products, particularly given the immediate national priority of stretching our existing conventional petroleum resouces. It would not be considered discriminatory for a producer or supplier to install and lease to its franchise an additional pump or pumps and related facilities for the marketing of gasohol or other synthetic fuels so long as the facilities were installed within a reasonable period of time and the franchisee is charged a reasonable rental, equivalent to the rental charged by the producer or supplier for the leasing of facilities for the marketing of conventional petroleum products. The Committee is aware of at least one major oil company, Mobil Corporation, which plans to adopt such a policy.

V. Information Submitted Pursuant to Rules

A. BUDGET STATEMENT

Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not provide new budgetary authority or increased expenditures.

B. COST

The Committee concurs with the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee for the purpose of clause 7 of House Rule XIII.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 26, 1980.

HON. PETER W. RODINO, JR.
Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7873, the Gasohol Competition Act of 1980, as ordered reported by the House Committee on the Judiciary, September 23, 1980.

This bill would outlaw actions that discriminate against the sale of gasohol or other synthetic motor fuels, including limits on the use of credit in the sale of gasohol or other synthetic motor fuels that are not similarly applied to conventional motor fuels. It is expected that no additional cost to the Federal Government will be incured as a result of enactment of this bill.

Sincerely,

ROBERT D. REISCHAUER
(For Alice M. Rivlin, Director).

C. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

D. OVERSIGHT STATEMENT

The Subcommittee on Monopolies and Commercial Law of this Committee exercises oversight responsibilities with respect to Government and private enforcement of the Federal antitrust laws. The favorable consideration of this bill was recomended by the subcommittee. The subcommittee will closely monitor the exercise of authority granted to the Department of Justice and private litigants by this legislation.

No findings or recommendations of the Committee on Government Operations were received as referred to in rule XI, clause 2(l)(3)(D).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives. changes in existing law made by the bill, as reported. are shown as follows (existing law proposed to be omitted is enclosed in black brackets. new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CLAYTON ACT

* * * * * * *

SEC. 26. It shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that—

(i) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where there is no similar limitation on transactions concerning such person's conventional motor fuel: Provided, That nothing in this section or in any other provision of law in effect on the date of enactment of this Act and which is specifically applicable to the sale of petroleum products, shall preclude such person from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or the other synthetic motor fuel if such fee equals no more than the actual costs to such person of extending that credit; or

(ii) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States: Provided, That the prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on equivalent terms and conditions as are available on such person's conventional motor fuel products: Provided further, That nothing in this section shall—

(a) preclude such persons from requiring reasonable labeling of pumps dispensing the gasohol or the other synthetic motor fuel to indicate, where appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person; or

(b) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or the other synthetic motor fuel; or

(c) require such person to provide advertising support for the gasohol or the other synthetic motor fuel; or

(d) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.

SEC. [26.] 27. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SEPARATE VIEWS OF MR. HYDE

H.R. 7873 is not the kind of legislation that should be considered in this, the twilight of the 96th Congress. This bill is being rammed through not for its merits but because the oil companies are such a convenient scapegoat and because gasohol and other synfuels presently hold wide appeal. But it is respectfully submitted that not every measure that hurts the oil companies is in the public interest. Nor is the end of promoting gasohol and other synfuels itself justification for the violation, unprecedented in our history, of traditional economic principles.

What this legislation does is to inject Congress into every gasoline dealer's franchise agreement to say that, no matter what the negotiated terms of that contract, the franchisee may sell products that are in direct competition with those of the oil company and the oil company must extend its credit for the sale of these competing products just as it does for its own products and must also permit its facilities to be utilized in whatever way necessary to allow the competing products to be sold at its outlets.

This is an unprecedented infringement on private property rights. Never before have we compelled by law a business to extend credit to promote its competition. Both in subcommittee and in full committee proponents were pressed to cite a precedent. They could not. We are still waiting to hear.

As a sop to traditional values, the bill permits the oil companies to recover the "actual costs" of extending credit to competitors. But as often as the proponents of this legislation were asked if the oil companies could recover normal interest charges on the extension of credit, just as often they refused to agree. It is clear that at least some proponents wish to deny the oil companies a fair return on the forced extension of credit. I would hope that they reconsider their position and be fair even to the benefit of the oil companies.

The other area of controversy concerns the use of facilities. Proponents repeatedly claim that this bill places no burdens on the oil companies. While it is true that the oil companies are not legally obligated by this legislation to construct additional pumps, storage tanks, and the like, they are placed by this legislation in an economic bind in which they must choose between reducing their own sales (and profits) and paying for the construction of new facilities. What this legislation does is to permit every dealer to convert existing pumps and storage tanks to the use of competing products. A pump that today contains gasoline will tomorrow contain gasohol. A storage tank that today contains gasoline will tomorrow contain synthetic fuels. Indeed, that is the purpose of the bill.

So if you are in the business of selling gasoline and your facilities have been converted in favor of competing products, what do you do? You either suffer a reduction in your business or build, at your own

expense, facilities equal to those you lost. This proponents boast is neutral treatment of the oil companies.

So it should be clear that it is not "discrimination" in any normal sense of the word that is being prohibited by this legislation. Rather, this bill strikes at heretofore accepted traditions of legitimate self-interest. It seems that some oil companies had the gall to insist that their credit and their facilities be used to make money for themselves. I fail to see what is outrageous about such conduct. I do think it outrageous that the law for the first time will require a business to subsidize its competition.

Clearly, competition is in the public interest. But while the oil companies might well be exhorted to promote competition, it is something else for us to require that they subsidize their competitors. To legislate that the failure to subsidize a competitor is an antitrust violation—subjecting the perpetrator to treble damage actions—turns antitrust law on its head. This bill is only one of many in a long line of political cheapshots directed at the oil companies. While it may not cost the oil companies much in dollars and cents, it will reflect adversely on the good sense of the Congress if this legislation is allowed to slip through, as we rush to our pre-election adjournment.

HENRY J. HYDE.

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